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Ching Kim Foo v Yeh Yi-Ling

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HIGH COURT (PENANG) — DIVORCE PETITION NO PA-33–334–09 OF 2017
LIM CHONG FONG J
5 JANUARY 2018

C

Civil Procedure — Service — Divorce petition — Whether service of petition could be dispensed with — Divorce and Matrimonial Proceeding Rules 1980 rr 12(10) & 87(1)

D

Family Law — Divorce — Petition — Whether High Court had jurisdiction to grant divorce petition where one party resided outside of Malaysia

This was divorce petition filed by the petitioner, a Malaysian man against the respondent, his foreign wife. They were married on 27 November 1995 at the Pertubuhan Tek Chiao Tze Ch'ih Ko in Bukit Mertajam, Penang. The marriage was duly registered, and they lived together in Bukit Mertajam. Sometime in 1998, the respondent left their house and she never returned ever since. On 29 September 2017, the petitioner finally filed this petition by reason that they had long been separated. The petition was supported by the petitioner's affidavit in support affirmed on 18 September 2017. In addition, the petitioner also filed an ex parte summons in chambers dated 13 October 2017 applying for the service of the petition to be dispensed. The petitioner contended that the respondent could not be traced and he did not know of her present whereabouts. A search was made by the petitioner at the Jabatan Imigresen Malaysia but there was no record available on the respondent's movement in and out of Malaysia.

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Held, allowing the summons in chambers and the petition:

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(1) Based on the case of *Ang Geck Choo v Wong Tiew Yong* [1997] 3 MLJ 467, the High Court had the jurisdiction to deal with the divorce petition (see paras 8–9).

(2) The petitioner had really no idea where to serve the cause papers on the respondent. They had been incommunicado for 20 years. It was impracticable for him to have search for her in Taiwan where she might possibly be staying now. Since the provision in r 87(1) of the Divorce and Matrimonial Proceeding Rules 1980 was discretionary and r 12(10) was permissive on dispensation of service where it would be necessary or

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A expedient to do so, the service of process on the respondent in a foreign country should be dispensed with (see para 11).

[Bahasa Malaysia summary

B Ini adalah petisyen penceraian yang difailkan oleh pempetisyen, seorang rakyat Malaysia terhadap responden, isterinya yang berwarganegara asing. Mereka telah berkahwin pada 27 November 1995 di Pertubuhan Tek Chiao Tze Chi'h Ko di Bukit Mertajam, Pulau Pinang. Perkahwinan tersebut telah didaftarkan dan mereka berdua tinggal bersama-sama di Bukit Mertajam. Sekitar tahun C 1998, responden bertindak meninggalkan rumah dan semenjak dari tempoh itu, responden tidak pernah pulang ke rumah. Pada 29 September 2017, pempetisyen akhirnya memfailkan petisyen penceraian disebabkan mereka telah lama berpisah. Petisyen penceraian tersebut telah disokong oleh afidavit sokongan yang disahkan pada 18 September 2017. Sebagai tambahan, D pempetisyen telah memfailkan saman dalam kamar (ex parte) bertarikh 13 Oktober 2017 memohon supaya penyampaian petisyen dikecualikan. Pempetisyen menyatakan responden tidak dapat dikesan dan pempetisyen tidak mengetahui tempat tinggal responden sekarang. Satu carian telah dilakukan oleh pempetisyen di Jabatan Imigresen Malaysia tetapi tiada rekod E pergerakan masuk dan keluar responden dari Malaysia.

Diputuskan, membenarkan saman dalam kamar dan petisyen:

(1) Berdasarkan kes *Ang Geck Choo v Wong Tiew Yong* [1997] 3 MLJ 467, Mahkamah Tinggi mempunyai bidang kuasa untuk mengendalikan F petisyen penceraian (lihat perenggan 8–9).

(2) Pempetisyen tidak tahu di mana untuk menyerahkan kertas kausa kepada responden. Mereka telah tidak berkomunikasi selama 20 tahun. Ia tidak praktikal untuk pempetisyen mencarinya di Taiwan di mana responden G mungkin tinggal sekarang ini. Disebabkan peruntukan k 87(1) Kaedah-Kaedah Prosiding Penceraian dan Perkahwinan 1980 adalah di bawah kuasa budi bicara dan k 12(10) yang membenarkan pengecualian penyampaian petisyen penceraian jika perlu dan suai manfaat untuk berbuat demikian, penyampaian petisyen terhadap responden di negara H asing perlu dikecualikan (lihat perenggan 11).]

Notes

For a case on divorce petition, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) para 8605.

I For cases on petition, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4381–4392.

Cases referred to

Ang Geck Choo v Wong Tiew Yong [1997] 3 MLJ 467, HC (refd)

Legislation referred to

Divorce and Matrimonial Proceeding Rules 1980 rr 12(10), 87(1)
Law Reform (Marriage and Divorce) Act 1976
Rules of Court 2012 O 1 r 2(2), O 11, Appendix C

Tan Lok Heah (Tan Lok Heah & Assoc) for the petitioner.

Lim Chong Fong J:

[1] This is a divorce petition filed by a Malaysian man against his foreign wife.

[2] The petitioner husband is a Malaysian citizen whereas the respondent wife is a Taiwanese citizen.

[3] They were married on 27 November 1995 at the Pertubuhan Tek Chiao Tze Ch'ih Ko in Bukit Mertajam, Penang. The marriage was duly registered and they lived together in Bukit Mertajam. They have a daughter born on 6 March 1996.

[4] Sometime in 1998, the respondent wife left their house and she never returned ever since. The daughter was left behind to be cared for by the petitioner husband.

[5] On 29 September 2017, the petitioner husband finally filed this petition by reason that they have long been separated. The petition is supported by the petitioner husband's affidavit in support affirmed on 18 September 2017. In addition, the petitioner husband also filed an ex parte summons in chambers dated 13 October 2017 applying for the service of the petition to be dispensed. the petitioner husband averred that the respondent wife could not be traced and he doesn't know of her present whereabouts. A search was made by the petitioner husband at the Jabatan Imigresen Malaysia but there is no record available on the respondent wife's movement in and out of Malaysia.

[6] The summons in chambers and petition came up for hearing before me on 15 November 2017. I was particularly concerned as to the necessity to invoke the O 11 of the Rules of Court 2012 procedure on service of process out of jurisdiction. The procedure generally entails the prior obtaining of leave of court to serve the process out of jurisdiction as well as to comply with the prescribed methodology of service of the process abroad, often through the consular authority.

As the result, I adjourned the hearing for detail research to be undertaken by

counsel especially because of present rampancy of Malaysian man marrying foreign wife in Malaysia.

[7] At the resumed hearing on 22 December 2017, it was pointed out by counsel that the court has jurisdiction by virtue of domicile of dependence and matrimonial proceedings are exempted pursuant to O 1 r 2(2) read with Appendix C of the Rules of Court 2012. Thus matrimonial proceedings are solely governed by the Law Reform (Marriage and Divorce) Act 1976 and the Divorce and Matrimonial Proceeding Rules 1980 made thereunder ('the Rules').

[8] As to jurisdiction, it is provided in the textbook *Family Law for Non Muslims in Malaysia* by International Law Book Services as follows:

> For a woman, she takes the domicile of her husband, upon marriage. A possible reason for this dependence is because under the common law, a husband and a wife were viewed as one entity. For as long as they remained married, the woman takes her husband's domicile. It does not matter that she may be living separately from her husband either through a decree of judicial separation or through an agreement. Only a decree of divorce will release her from this dependence.

Thus in *Ang Geck Choo v Wong Tiew Yong* [1997] 3 MLJ 467, Suriyadi J (later FCJ) held that the Malaysian courts still have jurisdiction to grant a decree of divorce to the petitioner Malaysia husband notwithstanding that the respondent Singapore wife is living in Singapore when the divorce was petitioned.

[9] I am therefore satisfied that I have the jurisdiction and power to deal with this petition.

[10] As to the procedure to be adopted, the relevant Rules in the present circumstances are as follows:

> 12 Service of Petition
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> (1) Subject to this Rule and Rules 84 and 87, a copy of every divorce petition shall be served personally or by post on every respondent or co-respondent.
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> (2) Service may be effected —
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> (a) where the party to be served is a person under disability within the meaning of Rule 83, through the petitioner; and
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> (b) in any other case, through the court or, if the petitioner so requests, through the petitioner.
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> (3) Personal service shall in no case be effected by the petitioner himself.

(4) A copy of any petition which is to be served through the court shall be served by registered post by an officer of the court.

(5) For the purposes of paragraphs (1) to (4) a copy of a petition shall be deemed to be duly served if —

(a) an acknowledgment of service in Form 6 is signed by the party to be served or by a solicitor on his behalf and is returned to the court office; and

(b) where the form purports to be signed by a respondent spouse, his signature is proved at the hearing.

(6) Where a copy of a petition has been sent to a party and no acknowledgment of service has been returned to the court office, the registrar, if satisfied by affidavit or otherwise that the party has nevertheless received the document, may direct that the document shall be deemed to have been duly served.

(7) Where a copy of a petition has been served on a party personally and no acknowledgment of service has been returned to the court office, service shall be proved by filing an affidavit of service showing, in the case of a respondent, the server's means of knowledge of the identity of the party served.

(8) Where an acknowledgment of service is returned to the court office, the registrar shall send a copy thereof to the petitioner.

(9) An application for leave to substitute some other mode of service for the modes of services prescribed in paragraph (1), or to substitute notice of the proceedings by advertisement or otherwise, shall be made ex parte by lodging an affidavit setting out the grounds on which the application is made; and the form of any advertisement shall be settled by the registrar.

(10) Where it appears necessary or expedient to do so, the registrar may by order dispense with service of a copy of a petition on the respondent or on any other person, and an application to a registrar for an order under this paragraph may, if no notice of intention to defend has been given, be made ex parte by lodging an affidavit setting out the grounds of the application.

87 Service out of Malaysia

(1) Any document in matrimonial proceedings may be served out of Malaysia —

(a) where the proceedings are pending in the High Court, in accordance with RHC Order 11, rules 5 and 6 (service of a writ abroad); or

(b) where the proceedings are pending in a Sessions Court in West Malaysia or a First Class Magistrate's Court in East Malaysia, in accordance with Subordinate Courts Rules 1980, Order 7 Rules 19 to 23 (service of process abroad).

(2) Where the document is served in accordance with RHC Order 11 rules 5

and 6, these rules shall have effect in relation to service of the document as they have effect in relation to service of notice of a writ.

(3) Where the document is served in accordance with Subordinate Courts Rules 1980, Order 7 Rules 19 to 23, these Rules shall have effect but the document need not be served personally on the person required to be served so long as it is served in accordance with the law of the country in which service is effected.

(4) Where an application is to be served on a person out of Malaysia, then —

(a) the time within which that person must give notice of intention to defend shall be determined having regard to the practice adopted under RHC Order 11, rule 4(3) (which requires an order for leave to serve a writ out of the jurisdiction to limit the time for appearance) and the notice in Form 5 shall be amended accordingly;

(b) if the application is to be served otherwise than in accordance with RHC Order 11, rules 5 and 6 or Subordinate Courts Rules 1980 Order 7 Rules 19 to 23, and there is reasonable ground for believing that the 'person to be served does not understand English, the application shall be accompanied by a translation, approved by the registrar, of the notice in Form 5, in the official language of the country in which service is to be effected or, if there is more than one official language of that country, in any one of these languages which is 'appropriate to the place where service is to be effected: Provided that this subparagraph shall not apply in relation to a document which is to be served in a country in which the official language, or one of the official languages, is English.

(5) Where a document specifying the date of hearing of any proceedings is to be served out of Malaysia, the date shall be fixed having regard to the time which would be limited under paragraph (4)(a) for giving notice of intention to defend as if the document were an application.

[11] On the facts herein, I am satisfied that the petitioner husband has really no idea where to serve the cause papers on the respondent wife. They have been incommunicado for 20 years. It is in my view impracticable for him to have to search for her in Taiwan where she may possibly be now staying. Since the provision in r 87(1) is discretionary and r 12(10) is permissive on dispensation of service where it would be necessary or expedient to do so, I find that this is an appropriate instance where service of process on the respondent wife in a foreign country should be dispensed.

[12] It is for the foregoing reasons that I hence allowed the summons in chambers and thereafter the petition accordingly in the absence of the respondent wife.

Summons in chambers and petition allowed.

Reported by Kamarul Anwar